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HISTORY OF THE LAW OF BUSINESS CORPORATIONS BEFORE 1800.

II.

(Concluded.)

THE fundamental difference in the constitution of business corporations from the earlier forms which preceded them is the joint-stock capital, and most of the law peculiar to this class of corporations relates to that difference, and the consequences which follow from it. From motives of convenience it early became customary to divide the joint stock into shares of definite amounts. The nature of the interest which it was conceived the holders of such shares possessed, and their rights and duties among themselves and against the corporation, so far as these were settled or discussed by the courts before the present century, will now be treated.

The most accurate definition of the nature of the property acquired by the purchase of a share of stock in a corporation is that it is a fraction of all the rights and duties of the stockholders composing the corporation.[1] Such does not seem to have been the clearly recognized view till after the beginning of the present century. The old idea was rather that the corporation held all its property strictly as a trustee, and that the shareholders were,

[1] Lowell, Transfer of Stock, § 4.

strictly speaking, *cestuis que trust*, being in equity co-owners of the corporate property.[1]

There are several classes of cases illustrating this difference in theory. Thus, if the shareholders have in equity the same interest which the corporation has at law, a share will be real estate or personalty, according as the corporate property is real or personal. If it were personalty, as was usually the case, no question would arise, for then on any view the shares would be personalty likewise. Let it be supposed, however, that the corporate property was real estate; then, according to the view formerly prevailing, the shares must be devised and transferred according to the statutes regulating the disposition of real estate; they would be subject to the land tax; and, in short, would have to be dealt with in the same way as other equitable interests in land. Exceptions to this general rule would have to be made if special modes of transfer were prescribed by a statute of incorporation. This was generally the case; provision was ordinarily made that the title to shares should pass by transfer on the books, and also that they should be personal property.

The question arose several times in regard to the shares of the New River Water Company. The title to the real estate controlled by the company seems to have been in the individual shareholders, the company (which was incorporated) having only the management of the business.[2] It was uniformly held that the shares were real estate, that they must be conveyed as such *inter vivos*, that a will devising them must be witnessed in the same manner as a will devising other real estate,[3] and that the heir and not the personal representative of a deceased owner was entitled to shares not devised.

The cases which were thus decided were afterwards distinguished[4] on the ground that the title to a large part of the real estate was in the corporators, and as to all of it the company had no power to convert it into any other sort of property, but had simply the power of managing it. The distinction, however, amounts to noth-

[1] "The legal interest of all the stock is in the company, who are trustees for the several members." *Per* Lord Macclesfield, Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

[2] As to the nature of the company see Bligh *v.* Brent, 2 Y. & C. 268.

[3] Drybutter *v.* Bartholomew, 2 P. Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Stafford *v.* Buckley, 2 Ves. Sr. 171, 182; Swaine *v.* Falconer, Show. P. C. 207; Sandys *v.* Sibthorpe, 2 Dick. 545.

[4] Bligh *v.* Brent, 2 Y. & C. 268, 296.

ing. If the individual proprietors owned the land and the company controlled it, the proprietors had two distinct kinds of property. One was real estate, and the fact that it was occupied by a corporation was immaterial ; the other was personalty, consisting of the bundle of rights belonging to the shareholders in any corporate company. Moreover, the decisions do not indicate that they were based on such a distinction.[1] It was not until the decision of Bligh *v.* Brent,[2] in 1836, that the modern view was established in England. The contention of the counsel for the plaintiff in that case, that the company held the corporate property as a trustee, and that the interest of the *cestui que trust* was coextensive with the legal interest of the trustee, was well warranted by the decisions which he brought forward to sustain it. Indeed, the greater part of the argument for the defendant admitted this, but contended that real estate held by a corporation for trading purposes should be treated as personalty, like that similarly held by a partnership.[3]

It is true that it was decided in 1781, in Weekley *v.* Weekley,[4] that shares in the Chelsea Water Works were personalty ; but no reasons are given for the decision, and it may have been based on the facts that a large part of the property of the company was personalty,[5] and that the shares were generally considered personalty, and dealt with as such. Otherwise the case seems inconsistent with the cases and reasoning previously alluded to.

In the case of the King *v.* The Dock Company of Hull[6] an attempt was made to apply conversely the principle that the property of a corporation and of its individual corporators is the same, except that the interest of the former is legal, of the latter, equitable. The act under which the company was formed[7] declared that the shares of the proprietors should be considered as personal property. It was argued that this made the real estate

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[1] See further, Howse *v.* Chapman, 4 Ves. 542, where a share in the Bath navigation was held to be real estate, and also Buckeridge *v.* Ingram, 2 Ves. 652, as to the Avon navigation. The latter company was not, it is true, incorporated, but the decision is not based on that distinction.

[2] 2 Y. & C. 268.

[3] In Wells *v.* Cowles, 2 Conn. 567, it was decided that turnpike shares were real estate. The argument was almost wholly confined to the question whether the property of the company was real estate or not. It was very summarily remarked that the property of the individual shareholders was of the same nature as that of the company.

[4] 2 Y. & C. 281, note.

[5] It was said in Bligh *v.* Brent, *supra*, that five-sixths of the property of the company was personalty.

[6] 1 T. R. 219.

[7] 14 Geo. III., c. 56.

of the corporation personalty, and hence not subject to the land tax. The court overruled the objection, not on the ground that the property of the corporation was entirely different from that of the shareholders, but because, "as between the heir and executor, this (the real estate of the company) is to be considered as personal property, but the Legislature did not intend to alter the nature of it in any other respect."

Another class of cases illustrating the theory now under consideration arose from the transfer of stock on the books of the company by fraud or mistake without the consent of the owner. When it is understood that the right of a shareholder is a legal right, it is obvious that such a transfer cannot effect his rights unless he is estopped to assert them.[1] If, however, the legal interest is in the corporation, and the right of a shareholder is only equitable, the transferee, in the case supposed, will acquire title, though perhaps he may not be allowed to retain it. The latter view was taken in all the cases which arose prior to the year 1800. One of the earliest of them was Hildyard *v.* The South Sea Company and Keate.[2] The plaintiff's stock had been transferred to Keate, an innocent purchaser, under a forged power of attorney. The court decided that the plaintiff was entitled to relief, and that the loss must fall on Keate. Apparently the court was of opinion, however, that until relief was given Keate was the actual stockholder, and not the plaintiff. Thus, it is assumed that the dividends which Keate had received were the dividends on the plaintiff's stock, and that they must be recovered at the suit of the plaintiff, not of the company. Further, the company is directed to "take this stock from the defendant Keate and restore it to the plaintiff." The case was afterwards overruled,[3] but in a way which served rather to emphasize the theory that the legal title to all the stock of a corporation is in the corporation itself.[4]

In Harrison *v.* Pryse[5] the facts were substantially the same, except that the defendant was not a purchaser for value. The company was not made a party. The plaintiff recovered the full value of his stock on the theory that it had been converted. The transfer on the books of the company, though without the plaintiff's authority, was assumed to have divested him of his stock.

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1 For a careful exposition of the modern view see Lowell, Transfer of Stock.

2 2 P. Wms. 76 (1722).

3 Ashby *v.* Blackwell, Ambl. 503.

4 See also Monk *v.* Graham, 8 Mod. 9.

5 Barnard. Ch. 324 (1740).

Lord Hardwicke, who decided the case, was of opinion that in case the estate of the defendant proved insufficient to satisfy the plaintiff's claim the company might be liable. "His reason was that the company must be considered as trustees for the owner at the time he purchased this stock, and as the stock had not been transferred with any privity of his, they must be considered as continuing his trustees."

The last and most explicit of this series of cases was decided by Lord Worthington in 1765.[1] The facts were the same as in Hildyard *v.* The South Sea Company.[2] It was admitted that the plaintiff was entitled to relief, and the only question was which of the defendants should bear the loss. It was decided that it must fall on the bank. The reason given was that "a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them (*sic*) to dispose of the trust money." Again, it is said by the Chancellor, "I consider the admission and acceptance of the transfer as the title of the purchaser."

Whether a contract for the sale of stock was a contract for the sale of goods, wares, or merchandise, within section 17 of the Statute of Frauds, is a question which was several times considered but not definitely decided in the eighteenth century. In Pickering *v.* Appleby[3] the judges were divided six to six as to whether a contract for the sale of ten shares of the Company of the Copper Mines required a memorandum in writing to make it enforceable. In other cases,[4] also, the point came up, but they went off on other grounds.

Whether specific performance could be had of such a contract is another question which was raised in the early part of the eighteenth century, because of the enormous fluctuations in prices at that time.[5] The earliest case was Cud. *v.* Rutter,[6] decided in 1719.

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[1] Ashby *v.* Blackwell and The Million Bank, Ambl. 503.

[2] 2 P. Wms. 76.

[3] 1 Com. 354, referred to in Colt *v.* Netterville, 2 P. Wms. 304, 308.

[4] Colt *v.* Netterville, 2 P. Wms. 304; Mussell *v.* Cooke, Prec. in Ch. 533. In this last case the court seemed of opinion that a memorandum was necessary.

[5] Caused by the expected vast profits of the South Sea Company and other "bubbles," and the subsequent collapse of these speculations.

[6] 1 P. Wms. 570: *sub nom.* Cuddee *v.* Rutter, 5 Vin. Abr. 538, pl. 21; *sub nom.* Scould *v.* Butter, 2 Eq. Cas. Abr. 18, pl. 8.

In Gardener *v.* Pullen, 2 Vern. 394; s. c. Eq. Cas. Abr. 26, pl. 4, which was a bill to be relieved from the penalty of a bond conditioned to be void on the transfer of certain East India stock, the court refused to relieve unless the stock was transferred; and to the same effect is Thompson *v.* Harcourt, 2 Bro. Par. Cas. 415.

Sir Joseph Jekyll decreed specific performance of a contract for the sale of South Sea stock, and Lord Chancellor Parker overruled the decree, his chief reason being, "Because there is no difference between this £1,000 South Sea stock and £1,000 stock which the plaintiff might have bought of any other person upon the very day."[1]

There is nothing to indicate that any distinction was supposed to exist between South Sea stock, which was government stock with certain additional rights, and shares in ordinary companies. Moreover, two years later Lord Macclesfield dismissed a bill for specific performance of a contract for the sale of £1,000 stock in the York Buildings Company, which was an ordinary joint-stock corporation, on the ground that the proper remedy was at law.[2]

The only foundation afforded before the year 1800 for the view now prevailing in England,[3] that contracts for the sale of shares, as distinguished from government stock, will be specifically performed, is the case of Colt *v.* Netterville,[4] a bill for specific performance of a contract for the transfer of York Buildings stock, which was demurred to. Lord King overruled the demurrer, saying that the case might be "attended with such circumstances that may make it just to decree the defendant either to transfer the stock according to the express agreement, or at least to pay the difference." This, however, is altogether too indefinite to be regarded as disapproval of the previous cases, and it may be confidently stated that the former rule on this point in England was the same as that now prevailing in this country;[5] that is, in the absence of special circumstances, such contracts will not be specifically enforced.[6]

Though the corporation was looked upon as a trustee and the shareholders as *cestuis que trust*, it was of course perfectly well

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1 See also, to the same effect, Cappur *v.* Harrison, Bunb. 135; Nutbrown *v.* Thornton, 10 Ves. 159.

2 Dorison *v.* Westbrook, 5 Vin. Abr. 540, pl. 22.

3 See Fry on Spec. Perf., part vi. ch. 1.

4 2 P. Wms. 304.

5 Moraw Corp. (2d ed.) § 218.

6 It was, indeed, said by Lord Eldon in Nutbrown *v.* Thornton, 10 Ves. 159, after he had remarked that it was perfectly settled that the court would not decree specific performance of an agreement to transfer stock, "In a book I have of Mr. Brown's, I see Lord Hardwicke did that;" but there is no record of any such decision by Lord Hardwicke, and further, there is an express dictum by him to the contrary in Buxton *v.* Lister, 3 Atk. 383.

recognized that there were rights and obligations not incident to an ordinary trust.

The practice of keeping books to record the transfer of stock was adopted by the East India Company, perhaps from its inception, and transfer on the books was regarded as essential for passing the title. Thus in 1679, in a suit for an account against a fraudulent assignee of East India stock, the company being joined,[1] the court decree that the company "do, upon application made to them, according to their custom, transfer back the said £150 stock to the plaintiff;" and it was customary to insert in the early charters incorporating business associations, a provision that the shares might be assigned by entry in a book kept for that purpose.[2] Therefore, one of the earliest well-recognized rights of a shareholder was to have his name kept upon the transfer book so long as he held stock;[3] and, in consequence of the assignability of shares, to have the name of his assignee substituted, if he parted with his interest.[4] It follows that if the company transferred stock, however innocently, without due authority from the owner, it was liable. Several cases arose of such transfers, where the company acted in compliance with a forged power of attorney.

In all these cases,[5] it seems to have been decided or assumed that the company was bound to reinstate the original owner on its books, as well as to pay him the dividends that had accrued, though the reasoning on which these decisions were based was influenced by the notion previously adverted to, that the shareholder occupied the position of a *cestui que trust.*

When shares were held in trust, of course, it was the name of the trustee which appeared upon the books; he and not the beneficial owner was entitled to all the rights of a shareholder.[6] This was fully recognized by the courts; and not only this, but it was laid down that the company, after express notice that stock was held in trust, was at liberty to ignore the fact, even so far as

[1] Cas. temp. Finch, 430.

[2] See, *e. g.*, in the case of the Greenland Company, 4 and 5 Wm. & M. c. 17, s. xxiv., in the case of the Bank of England, 5 and 6 Wm. & M. c. 20, s. xxv., in the case of the Nat. Land Bank, 7 and 8 Wm. III., c. 31, s. xvii.

[3] Bank of Eng. *v.* Moffatt, 3 Bro. C. C. 160; Johnson *v.* E. I. Co., Cas. temp. Finch, 430.

[4] Cock *v.* Goodfellow, 10 Mod. 489, 498, 20 Vin. Abr. 5, pl. 16.

[5] See *supra.*

[6] Stockdale *v.* South Sea Co. 1 Atk. 140; s. c. Barnard. Ch. 363; Hartga *v.* Bank of England, 3 Ves. 55; Bank of England *v.* Parsons, 5 Ves. 664.

to allow the trustee to commit a fraud on the *cestui que trust* unless the trust appeared on the books.[1] The right to such complete disregard of equitable interests rested perhaps not so much on decisions as on dicta which may be attributed to a careless over-emphasis of the fact that the legal interest, and, in general, the entire control of stock held in trust, is in the trustee.

In case of refusal by the officers of a company to transfer on the books at the request of the owner of stock, the proper remedy was not wholly clear in the last century. In the case of King *v.* Douglass[2] an application was made for a mandamus to compel a transfer. Lord Mansfield refused to allow this extraordinary remedy, and suggested a special action of assumpsit, and probably that action would have been held proper. Whether specific performance of the obligation would be enforced by equity was not suggested, but it is not unlikely that such a remedy would have been allowed.[3]

The right of a shareholder to vote at the election of officers, and in regard to by-laws for the management of a business corporation, was formerly precisely analogous to the similar right necessarily possessed by the members of all corporations from their origin, such as the members of a municipal corporation, for instance, still possess. That is, each shareholder was entitled to one vote if given by him in person. This was at first the rule in the East India Company, but naturally enough, it soon became distasteful to the larger owners, and various changes were made at different times; for example, that only holders of £500 stock should have the right to vote, the smaller holders being allowed to pool their stock to make up the necessary amount.[4] This was simply a restriction of the suffrage. The units of which the corporation was composed were still considered to be the members, as is the case in municipal corporations and guilds, — not shares, as is the case in the modern joint-stock corporation. The gradual progress from the old view to the modern one is shown by the changes in the power of voting. It soon became usual to allow the larger holder more than one vote, and it was customarily provided in the charters how many votes should belong to the owner of a given num-

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[1] Stockdale *v.* South Sea Co., 1 Atk. 140; S. C. Barnard. Ch. 363.

[2] 2 Doug. 524.

[3] See Meliorucchi *v.* Royal Exchange Ass. Co., 1 Eq. Cas. Abr. 8, pl. 8; Gibson *v.* Hudson's Bay Company, 1 Str. 645.

[4] Macpherson, Hist. of Com. 125.

ber of shares, the owner of a large number having more votes than the owner of a few, but not proportionately more. Thus, in the Greenland Company, each subscriber of £500 had one vote, each subscriber of £1000 or more had two votes, and in no case could a shareholder have a greater number, however great his holding might be;[1] and in other charters are similar provisions. Except for some such provision, no doubt, each shareholder would have been entitled to but one vote. It did not take very great ingenuity to devise a plan by which owners of large amounts of stock could, in effect, secure a number of votes in proportion to their holdings. All that was necessary was to make temporary transfers of stock to a number of friends,—a practice called "splitting stock." The preamble of an act passed in 1766[2] shows the custom at that time. It recites "certain publick companies or corporations have been instituted for the purpose of carrying on particular trades or dealings with joint stock, and the management of the affairs of such companies has been vested in their general courts, in which every member of each company possessed of such share in the stock as by the charter is limited, is qualified to give a vote or votes;" and it is further recited that "of late years a most unfair and mischievous practice has been introduced, of splitting large quantities of stock, and making separate and temporary conveyances of the parts thereof for the purpose of multiplying or making occasional votes immediately before the time of declaring a dividend, of choosing directors, or of deciding any other important question, which practice is subversive of every principle upon which the establishment of such general courts is founded, and if suffered to become general, would leave the permanent welfare of such companies liable at all times to be sacrificed to the partial and interested views of a few." It is then provided by the act that in future members who have not held their stock for at least six months shall not vote.

As an instance of the conservatism of the English law in matters of form it may be mentioned that by the English Companies Act of 1862 the votes of shareholders are limited, so that one vote is allowed for every share up to ten, for every five shares between ten and one hundred, and for every ten shares beyond that.[3] But

[1] 4 and 5 Wm. & M., c. 17, s. xvii.

[2] 7 Geo. III., c. 48.

[3] Buckley on the Companies Acts (4th ed.), 436.

it is now held that a shareholder may distribute his stock in lots of ten among his friends, and thereby secure, in a clumsy and troublesome way, a vote for every share.[1]

The right to vote by proxy was not allowed at common law, in the absence of some special authorization.[2] This was often given in the charter.[3] Contrary to what is now generally held,[4] it is very doubtful if the authority of a by-law would have been held in the last century sufficient to confer the right.[5]

That the directors of a corporation shall manage its affairs honestly and carefully is primarily a right of the corporation itself rather than of the individual stockholders. The question may, however, be considered in this connection.

The only authority before the present century is the case of The Charitable Corporation *v.* Sutton,[6] decided by Lord Hardwicke. But this case is the basis, mediate or immediate, of all subsequent decisions on the point, and it is still quoted as containing an accurate exposition of the law.[7] The corporation was charitable only in name, being a joint-stock corporation for lending money on pledges. By the fraud of some of the directors or "committee-men," and by the negligence of the rest, loans were made without proper security. The bill was against the directors and other officers, "to have a satisfaction for a breach of trust, fraud, and mismanagement." Lord Hardwicke granted the relief prayed, and a part of his decision is well worth quoting. He says, "Committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation.

"In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance.[8]

"Now, where acts are executed within their authority, as repealing by-laws and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that

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1 Moffat *v.* Farquhar, 7 Ch. D. 591, and cases therein cited.

2 Phillips *v.* Wickham, 1 Paige Ch. 590; State *v.* Tudor, 5 Day, 329; Taylor *v.* Griswold, 14 N. J. L. 222; People *v.* Twaddell, 18 Hun, 427: Common. *v.* Bringhurst, 103 Pa. St. 134; Harben *v.* Phillips, 23 Ch. D. 14.

3 *E.g.*, the charter of the Mine Adventurers, 9 Anne, c. 24, or of the Northumberland Fishery Soc., 29 Geo. III., c. 25.

4 Common. *v.* Bringhurst, 103 Pa. St. 134, and cases therein cited.

5 See the early case of Taylor *v.* Griswold, 14 N. J. L. 222 (1834).

6 2 Atk. 400.

7 Taylor on Corp. § 619.

8 Citing Domat's Civil Law, 2d B., tit. 3, secs. 1 and 2.

these are breaches of trust. For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and therefore were guilty of a breach of trust.

"Next as to malfeasance and nonfeasance.

"To instance in non-attendance; if some persons are guilty of gross non-attendance, and leave the management entirely to others they may be guilty by this means of the breaches of trust that are committed by others.

"By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees.[1]

"Another objection has been made that the court can make no decree upon these persons which will be just, for it is said that every man's non-attendance or omission of duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect which makes it a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all liable.

"Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

The members of any corporation were entitled to inspect the books of the corporation. The only difference between business and other corporations as to the right of inspection was this: The books of municipal corporations and guilds might be inspected by non-members under certain circumstances, because the regulations of such bodies were not binding on members alone, and consequently outsiders might be vitally interested in the corporate proceedings.[2] Business corporations, on the other hand, were private, and the right of inspection belonged solely to members.[3]

The most important right of shareholders, the right to divi-

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[1] Citing Coggs *v.* Bernard, 1 Salk. 26.

[2] See Grant on Corp. 311–313.

[3] Charitable Corp. *v.* Woodcraft, Cas. temp. Hard. 130.

dends, was of course always recognized. It is necessarily implied in the conception of a joint-stock company. No cases, however, seem to have been decided before the year 1800 which illustrate the nature of the right. The same remark applies to the right of a shareholder to share in the distribution of the capital stock if the affairs of the corporation are wound up.

The correlative duties imposed on a shareholder were fewer and simpler than his rights. In the first place, he was bound to pay to the corporation, when called upon, the amount of his share in the joint stock, or so much of it as had not been paid by prior holders. The practice of paying in instalments for stock subscribed seems to have arisen at an early date. It is referred to as common in 1723. Lord Macclesfield speaks of "the common by-laws of companies to deduct the calls out of the stocks of the members refusing to pay their calls." [1]

In 1796 the question arose whether an original subscriber could avoid liability for future calls by assigning his stock.[2] It was contended that the case was like the assignment of a lease, "in which, though the lessor consents to the lessee's assigning to a third person, he does not give up his remedy against the original lessee." The Court of King's Bench, however, decided that assignees held the shares on the same terms as the original subscribers, and were substituted in their places. The objection that an assignment might be made to insolvent persons was met by saying that it was presumed that the undertaking was a beneficial one, and therefore the right to forfeit shares for non-payment of calls furnished a sufficient check.

No doubt it has been settled for a long time that individual members are not liable for the debts of a corporation, and it has even been said that "the personal responsibility of the stockholders is inconsistent with the nature of a body corporate;" [3] yet in the Roman law it seems that if the corporation became insolvent the persons constituting it were obliged to contribute their private fortunes;[4] and though it may be hazardous to assert that at common law the rule was the same in England, it is certain that, so far as the evidence goes, it points to that conclusion.

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1 Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

2 Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36.

3 Myers *v.* Irwin, 2 S. & R. 371, *per* Tilghman, C. J.

4 Ayliffe, 200, referring to code, Bk. i. tit. 3; Savigny Sys. § 92.

This was not on any theory that the debt of the corporation was directly the debt of its members, for the contrary seems to have been well understood. For instance, in Y. B. 19 Hy. VI. 80, it was held that an action of debt being brought against the Society of Lombards, and the sheriff having distrained two individual Lombards, trespass would lie against him. "For where a corporation is impleaded they ought not to distrain any private person." And in the case of Edmunds *v.* Brown[1] it was held that certain members of the Company of Woodmongers, who had signed a bond as its officers, were not personally liable when the company was dissolved.[2] If, however, there was an obligation running to the corporation from its members, to be answerable to the corporation for the liability of the latter to the outside world,[3] this obligation would be part of its assets, which, though not available in a law court, could be reached in equity, and so indirectly the members could be forced to discharge the corporate debts. That such was the case was directly decided in the case of Dr. Salmon *v.* The Hamborough Company.[4] This was an appeal to the Lords from the dismissal of a bill in Chancery against the Hamborough Company and some of its individual members, setting forth that the company owed the plaintiff money, but had nothing to be distrained by, and could, therefore, not be made to appear.[5] The Lords ordered that the dismissal be reversed, and that if the company did not appear the bill should be taken *pro confesso*, and in that event, and also in case the company appeared and the plaintiff's claim was found just, a decree should be made that the company pay; and on failure to do so for ninety days, "that the governor or deputy governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter do constitute a quorum for the making of leviations upon the trade or members of the said company, shall make such a leviation upon every member of the said company as is to be contributary to the public charge, as shall be sufficient to satisfy the sum decreed to the plaintiff;" and in case of failure to answer these

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[1] 1 Lev. 237.

[2] See also Bishop of Rochester's Case, Owen, 73; s. c. 2 And. 106; Case of the City of London, 1 Ventr. 351.

[3] That there was such an obligation in the Roman law see Savigny, § 92.

[4] Ch. Cas. 294; s. c. 6 Vin. Abr. 310.

[5] A *distringas* was the proper and only process against a corporation. Curson *v.* African Co., 1 Vern. 182; Harvey *v.* E. I. Co., 2 Vern. 395; 3 Keb. 230, pl. 8.

"leviations," process of contempt should issue against them. By a note to Harvey *v.* East India Company,[1] it may be seen that the course thus outlined was actually carried out, and the individual members were charged in their private capacities. It is true that the Hamborough Company was a regulated, not a joint-stock, corporation; but there seems to be no reason why the question should not be the same for both kinds, or that, when the case was decided, there was supposed to be any distinction. Indeed, there is no case decided before the present century which is inconsistent with the theory that members of a corporation are thus liable, though very possibly that idea became contrary to the general understanding.

In another early case[2] creditors who were members of the indebted company were postponed to the other creditors. Lord Nottingham says, "That if losses must fall upon the creditors, such losses should be borne by those who were members of the company, who best knew their estates and credit, and not by strangers who were drawn in to trust the company upon the credit and countenance it had from such particular members."

The case of Dr. Salmon *v.* The Hamborough Company was criticised by Fonblanque in 1793.[3] It was, however, followed to its fullest extent in South Carolina so late as 1826 in a very carefully considered case, and on appeal the decision was affirmed.[4] Even after 1840 the doctrine for which the case stands found support.[5]

The ways in which a corporation might be dissolved, and the consequences of dissolution, were fully considered by the older writers. It was laid down that a corporation might be dissolved, 1st, by act of Parliament; 2d, by the natural death of all its members; 3d, by surrender of its franchises; 4th, by forfeiture of

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[1] 2 Vern. 396.

[2] Naylor *v.* Brown, Finch, 83 (1673).

[3] 1 Fonblanque Eq. (1st ed.) 297, note. The learned author also suggests that the Hamborough Company was not incorporated, but in Viner's report of the case it is expressly called a corporation, and it appears that as a matter of fact it had been chartered. Ang. and Ames on Corp. (11th ed.) 42; 4 Am. Law Mag. 366, note.

[4] Hume *v.* Windyaw and Wando Canal Co., 1 Car. L. J. 217; s. c. 4 Am. L. Mag. 92.

[5] 1 Am. Law Mag. 96, answered in 4 Am. Law Mag. 363. See also a small pamphlet by A. L. Oliver, entitled "The Origin and Nature of Corporate Powers and Individual Responsibility of the Members of Trading Corporations at Common Law," in which the author favors the view here expressed, though on the broader, and it seems untenable, ground that a corporation is in its nature a partnership with a right to sue by one name.

its charter through negligence or abuse of its franchises.[1] The second of these methods is inapplicable to business corporations, for the shares of the members are property and would pass to their personal representatives. Further, it should be added that a corporation may be dissolved by the expiration of the time limited in its charter.

Forfeiture of a charter was enforced by *scire facias* or an information in the nature of *quo warranto.* It is only in connection with the question of forfeiture that importance was attached to the fact that a corporation had acted in excess of the authority given by its charter. Not a trace of the modern doctrine of *ultra vires* is to be found before the present century.[2] The other ways in which a corporation could be dissolved need no elaboration.[3]

Kyd says,[4] "The effect of the dissolution of a corporation is, that all its lands revert to the donor, its privileges and franchises are extinguished, and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it in their natural capacities. What becomes of the personal estate is, perhaps, not decided, but probably it vests in the crown."

The accuracy of the statement that the lands of a dissolved corporation revert to the donor has been doubted in Gray on Perpetuities.[5] After a very careful examination of authorities the learned author arrives at the conclusion that the lands would escheat, and offers the following explanation to account for the prevalence of the theory which he controverts. Most early corporations held their lands in frankalmoign, a tenure in which the lord was always the donor. Hence, on the dissolution of a corporation, its lands, though they escheated, would generally go to the donor.

The explanation is ingenious, and very likely true. It may, however, be urged that Lord Coke, to whose statements[6] are to be attributed, in the main, the wide acceptance in later times of the doctrine under consideration, is not likely to have made such a palpable blunder in regard to a question of tenure. The sug-

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[1] 1 Blackst. Com. 485, and to the same effect, 2 Kyd, 446.

[2] Brice, Ultra Vires (2d ed.), x.

[3] They are fully discussed in 2 Kyd, 446, Grant on Corp. 295, and elsewhere.

[4] Vol. ii. 516.

[5] §§ 46–51.

[6] Co. Lit., 13 b; Dean and Canons of Winsor *v.* Webb, Godb. 211.

gestion is offered with diffidence, that a real or fancied analogy in the civil law may be the true foundation on which the doctrine rests. The early English law of corporations is borrowed almost wholly from the Roman law.[1] This certainly creates an antecedent probability in favor of the suggestion offered. Domat says, "If a corporation were dissolved by order of the Prince, or otherwise, the members would take out what they had of their own in the corporation."[2] This confines the application of the rule to members; but it may have been regarded as applying to any donor of a corporation, or may, at least, have furnished an analogy.

The doctrine itself, whatever its basis may have been, was uniformly quoted by judges and text-writers as accurate,[3] excepting in one case.[4]

The disposition of the personalty of a corporation on its dissolution was not discussed by the early writers, undoubtedly because of the insignificance at that time of personal property. No expression of judicial opinion on the matter is to be found. Kyd's remark[5] probably represents the generally received opinion at the time he wrote.[6]

The statement was made by Blackstone[7] that "the debts of a corporation either to or from it are totally extinguished by its dissolution." This remark has been repeated by later authors, and has led to some confusion. It was, undoubtedly, an error. The only authority cited to support it is Edmunds *v.* Brown.[8] The Company of Woodmongers had been dissolved. It had given a

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[1] Mackenzie, Studies in Roman Law, 149; Grant on Corp. 2.

[2] Vol. ii. bk. i. tit. 15, § 2, ¶ 8.

Mackenzie (Studies in Roman Law) says that no positive rule can be laid down as to what became of the property of a dissolved corporation; that it varied according to the nature of the corporation.

[3] 1 Roll. Abr. 816 a; Moore, 282, 283, pl. 435; *per* Lord Hardwicke in Atty.-Gen. *v.* Gower, 9 Mod. 224, 226; *per* Lord Mansfield in Burgess *v.* Wheate, 1 W. Bl. 123, 165; Law of Corp. 300; Wood, Inst. bk. i. c. viii.; 1 Blackst. Com. 484; 2 Kyd, 516; Bell's Principles (Scotch), § 2190.

[4] Johnson *v.* Norway, Winch, 87, and Co. Lit. 13 b, Hargrave's note. In the case as reported no decision is given. The only authority is Hargrave's statement that in Lord Hale's MS. it is said that the court finally decided that the land should go to the lord, not to the donor.

[5] *Supra.*

[6] The same statement is made by counsel *arguendo* in Colchester *v.* Seaber, 3 Burr. 1868.

[7] 1 Com. 484.

[8] 1 Lev. 237.

bond to the plaintiff, which was signed by the defendants for the company. This action was debt on the bond against the individuals who signed it. The plaintiff failed, and rightly, for the bond was not executed by the defendants as individuals but for the company. The difficulty, however, was simply in the remedy which the plaintiff chose. This is evident from the case of Naylor *v.* Brown,[1]— a suit in equity by the creditors of the Woodmongers' Company, begun immediately after the failure of the action at law just referred to. On the dissolution of the company, the members had divided up its property. It was decreed that the property should be returned, "it being in equity still a part of the estate of the late company," and that the debts due the plaintiffs should be discharged from the fund so formed. This important case, which seems to have been generally overlooked,[2] clearly shows that the property of a dissolved corporation was liable in equity for the corporate debts, although they were unenforceable at law.

Whether debts owing to a dissolved corporation could be enforced for the benefit of the creditors or members of the corporations, or for the benefit of the State as *bona vacantia*, was not decided before the year 1800.

The history of the law of business corporations has thus far been treated with reference only to English decisions. In this country questions pertaining to corporations were brought before the courts in very few cases until the present century.

Pennsylvania is entitled to the honor of having chartered the first business corporation in this country,[3] "The Philadelphia Contributionship for Insuring Houses from Loss by Fire." It was a mutual insurance company, first organized in 1752, but not chartered until 1768. It was the only business corporation whose charter antedated the Declaration of Independence. The next in order of time were: "The Bank of North America," chartered by Congress in 1781 and, the original charter having been repealed in 1785, by Pennsylvania in 1787; "The Massachusetts Bank," chartered in 1784; "The Proprietors of Charles River Bridge," in 1785; "The Mutual Assurance Co." (Philadelphia), in 1786; "The Associated Manufacturing Iron Co." (N.Y.), in 1786.

[1] Finch, 83.

[2] It is not referred to by Blackstone, Kyd, Kent, Angell and Ames, Field, Taylor, Morawetz or any other writer on the subject so far as observed.

[3] Laws of Pa. ch. dlxxvi.

These were the only joint-stock business corporations chartered in America before 1787. After that time the number rapidly increased, especially in Massachusetts. Before the close of the century there were created in that State about fifty such bodies, at least half of them turnpike and bridge companies. In the remaining States combined, there were perhaps as many more. There was no great variety in the purposes for which these early companies were formed. Insurance, banking, turnpike roads, toll-bridges, canals, and, to a limited extent, manufacturing [1] were the enterprises which they carried on.

The rapid growth of corporations was followed in the early decades of the present century by the judicial decision of the questions which naturally arose as to the nature of the bodies which had been created by the Legislature, their rights and duties, and the rights and duties of their stockholders. But not even a beginning of this development was made prior to the year 1800. Before that time, whatever knowledge of these matters American lawyers possessed must have been derived from the English cases and English text-books previously considered.

Samuel Williston.

CAMBRIDGE, MAY 31, 1888.

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[1] There were several manufacturing companies in Massachusetts, but very few in other States.